



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-03-02*

QUESTION

May a City Councilor of the City of X apply on behalf of, or receive compensation from, a private party to obtain a building, electrical, wiring, plumbing, gas fitting or septic system permit from the City's Department of Inspectional Services, or be privately compensated to perform work pursuant to these permits?

ANSWER

No. The specific exemption that allows a municipal employee to apply on behalf of and receive compensation from a private party to obtain a building, electrical, wiring, plumbing, gas fitting or septic system permit is not available to a City Councilor of the City of X because the City Council regulates the activities of the permit-granting agency.

FACTS

You are a member of the City Council of the City of X (City). You are also an officer of a private construction company (Company). In that, you enter into contracts on behalf of the Company so it may serve as general contractor while you personally serve as the construction supervisor. You are also a licensed professional engineer.

Your private work involves preparing plans and documents clients use in applying for building permits. In the City, the Department of Inspectional Services (Department),¹ the Zoning Board, Planning Board and, in some instances, the Conservation Commission grant permits based on such plans. The Commissioner of Inspectional Services (Commissioner) is appointed by the Mayor and his appointment is confirmed by majority vote of the City Council.² The Commissioner is in charge of all subordinate officers and employees of the Department, including, the building commissioner, two building inspectors, a plumbing and gas inspector, the director of health and code services, sanitary code inspectors, sanitary inspectors, food and milk inspector, public health nurses, the sealer of weights and measures, and the assistant sealer of weights and measures.³

The City Council must review and approve or disapprove any ordinance involving Department regulations. If the Department wishes to change the fees it imposes, the Council must approve or disapprove such a change. The Council must also review and approve or disapprove any reorganization of the Department. The Mayor's appointees to the Department or his decisions to remove personnel from the Department must be

reviewed and approved or disapproved by the Council. Although the Council does not negotiate the union contracts involving Department personnel, it must approve or disapprove appropriating funds for those contracts. The Council must review and approve or disapprove pay increases/decreases in non-union contracts. The Council also must review and approve or disapprove the Department's budget and any supplemental budget requests.

It is most noteworthy that the City Council approves all the City ordinances that govern the operation of the Department. The Department and its composition are established by City ordinance.⁴ City ordinance establishes the fees the Department may charge for various types of inspections.⁵ The Commissioner is appointed by the Mayor, subject to confirmation of the City Council. The City ordinances require the Commissioner to make an annual report of the Department's activities to the City Council.⁶

The City Council approved the "City of X Zoning Ordinance" (Zoning Ordinance).⁷ For example, any change to the Zoning Ordinance, regardless of who proposed the change, must be reviewed and approved by the Council.⁸ The City Council has the authority to amend the Zoning Ordinance.⁹ The Department personnel must apply the Zoning Ordinance.

The City Council, like the Mayor, has no role in specific decisions about the application of the State Building Code or Health Code.¹⁰ Any disputes an applicant may have about the Department's interpretation of the Building Code may be appealed to the Commonwealth's Board of Building Regulations and Standards¹¹ or a state building inspector "may review any order or decision of a local inspector."¹²

Finally, the City Charter calls for a committee on personnel and administration, "to which shall be referred all personnel measures within the purview of the city council, and all measures the effect of which would be to alter the administrative structure of the city government."¹³

According to the City Attorney and the Ordinances, the City Council, as the legislative body of the City, does not oversee the day-to-day administration of municipal officers or boards.¹⁴

DISCUSSION

As a City Councilor, you are a municipal employee¹⁵ subject to the conflict law. Section 17 of G. L. c. 268A generally prohibits a municipal employee from receiving compensation from, or from acting (with or without compensation) as agent¹⁶ or attorney for, anyone other than the City in relation to any particular matter¹⁷ in which the City is a party or in which it has a "direct and substantial interest."¹⁸

Section 17 is aimed at prohibiting misconduct arising from divided loyalty and influence peddling.¹⁹ “The Legislature was entitled to [preclude] all potential conflicts before they become a reality and before damage, even unwittingly, has been done. The Legislature may have recognized that it is not always easy to tell when an actual conflict has arisen. These ‘section[s] of the statute [reflect] the old maxim that “a man cannot serve two masters.” [They seek] to preclude circumstances leading to a conflict of loyalties by a public employee.”²⁰ Accordingly, there are concerns that a municipal employee may not only favor a private interest over his municipality’s interest in a particular matter but also be in a position, when acting as a private agent, to exert undue influence on behalf of his private client.

The Commission has concluded that being paid to prepare plans for submission to a municipal authority for approval constitutes receiving compensation in relation to a particular matter of direct and substantial interest to the municipality.²¹ Similarly, being compensated to perform work pursuant to a permit is presumptively in relation to the permit.²² With respect to building permits, the municipality “has a direct and substantial interest in an application for, and the issuance of, a building permit because the issuance of a permit is the local building official’s decision or determination that the work complies with all relevant codes, laws, ordinances, rules or regulations.”²³

In 1998, § 17 was amended to add the following exemption from the general prohibition:

This section shall not prevent a municipal employee from applying on behalf of anyone for a building, electrical, wiring, plumbing, gas fitting or septic system permit, nor from receiving compensation in relation to any such permit, unless such employee is employed by or provides services to the permit-granting agency or an agency that regulates the activities of the permit-granting agency.²⁴

As we said in EC-COI-99-3, this exemption allows “a municipal employee to apply for a permit, or be paid in relation to one, so long as the employee’s own agency is not the agency which issues the permit, and is not an agency which regulates the activities of the permit-issuing agency.”²⁵ As a City Councilor, you are not “employed by . . . the permit-granting agency,” which is the Department, and you do not, as a City Councilor, “provide services to” the Department, as that phrase is commonly understood. For the purposes of § 17, you are “employed by” the City Council because that is the municipal agency²⁶ in which you are holding an office. The issue is whether the City Council is “an agency that regulates the activities of” the permit-granting agency.²⁷

Our analysis of this issue begins with the plain meaning of the statutory language in the exemption.²⁸ As we recently discussed in EC-COI-99-2, because the term “regulate” is not defined in the conflict law, we may look to commonly accepted meanings.

“Regulate” has been defined as “to govern or direct according to rule or bring under control of constituted authority, to limit and prohibit, to arrange in proper order, and to

control that which already exists.”²⁹ This meaning has been applied in the contexts of zoning,³⁰ electrical utility regulation,³¹ or insurance regulation.³² Similarly, concepts described in the general definitions of “regulate” appear, for example, in the General Laws about watershed resources³³ and fisheries.³⁴

To date, we have not applied this exemption in § 17 to the relationship between a city council and another city agency under the City’s form of government.³⁵ In EC-COI-91-9, the agency in issue was separate from the city council except that the council approved the agency’s budget. The agency’s appointing authority was a commission appointed by the mayor. In those circumstances, the Ethics Commission concluded that city councilors had “either regulatory control over, or participate[d] in, activities of the agency” for purposes of § 20, which prohibits a city councilor from having, in addition to his city council position, a direct or indirect financial interest in a city contract unless he qualifies for one of the § 20 exemptions. In that opinion, however, the Commission did not discuss what the phrase “regulatory control over” means, although the Commission cited the definition we have quoted above.

By contrast, but again in applying the § 20 rather than the § 17 prohibition, the Commission has decided that city councilors do not have official responsibility for, and do not regulate the activities of, a school committee for purposes of applying the phrase “regulates the activities of the contracting agency” appearing in § 20(b).³⁶ We stated in that opinion that “under no set of circumstances could we conclude that the Council directs or governs the activities of the School Committee, particularly given that the Legislature has expressly stated otherwise with respect to the School Department budget allocations, and educational policy and programmatic issues.”³⁷

Here, by contrast, the City Council, as the City’s legislative body, possesses considerable power over the Department. The City Council must review and approve any change in the Department’s regulations. The Council has the authority to approve the City’s Zoning Ordinance, which the Department applies as part of its duties, and any other City ordinances that govern the Department’s operations. The Council sets the fees that the Department charges. All measures involving expenditures of City funds are subject to the Council’s review and approval or disapproval. In addition, the Council reviews all measures that would alter the City government’s administrative structure, including the Department. Moreover, the City Council must approve or disapprove the appointment of the Commissioner. These types of functions exemplify the power to “direct according to rule” or “to control that which already exists.” We conclude, therefore, that the City Council regulates the activities of the Department.³⁸

Accordingly, we conclude that this exemption to § 17 is not available to you, as a City Councilor, because you are employed by an agency, the City Council, that regulates the activities of the permit granting authority, the Department.

As a result, the conflict of interest law continues to prohibit you from being compensated by and from acting (even for no compensation) as agent for your private

engineering and construction clients or the Company in relation to any particular matter in which the City is a party or in which it has a direct and substantial interest. The conflict law prohibits you from being privately paid to prepare, for example, engineering plans that your clients must submit to the Department to obtain a building permit. Similarly, you may not be paid by a private source, or act as agent for a private party, to submit engineering plans to any other City agency for its review and approval. You may not, on behalf of a private client act as a construction supervisor, perform work pursuant to a building permit, or represent the private client in dealings with City officials who must inspect and approve the work.³⁹

DATE AUTHORIZED: September 18, 2003

*All identifying information has been deleted from this opinion as required by Chapter 268B, section 3(g).

¹ City Ordinances.

² City Charter.

³ City Ordinances.

⁴ City Ordinances.

⁵ City Ordinances.

⁶ City Ordinances.

⁷ City Ordinances.

⁸ City Ordinances.

⁹ City Ordinances.

¹⁰ Compare G. L. c. 143, § 3Z, entitled “Regulation of building inspectors also practicing for hire or engaged in business,” if the city council accepts this section, part-time building inspectors may “practice for hire or engage in the business for which he is certified” provided that he not exercise “any of his powers and duties as such inspector” with respect to his own (private) work. We do not know whether the City Council has accepted § 3Z.

¹¹ G. L. c. 143, § 100.

¹² G. L. c. 143, § 3A.

¹³ City Charter.

¹⁴ The City Attorney, at your request and with your permission, provided us the relevant information and copies of the applicable provisions from the City Charter and City Ordinances.

¹⁵ “Municipal employee, a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis” G. L. c. 268A, § 1(g).

¹⁶ The Commission has concluded that “the distinguishing factor of acting as agent within the meaning of the conflict law is ‘acting on behalf of’ some person or entity, a factor present in acting as spokesperson, negotiating, signing documents and submitting applications.” *In re Sullivan*, 1987 SEC 312, 314-315; See also, *In re Reynolds*, 1989 SEC 423, 427; *Commonwealth v. Newman*, 32 Mass. App. Ct. 148, 150 (1992).

¹⁷ “Particular matter, any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding” G. L. c. 268A, § 1(k).

¹⁸ G. L. c. 268A, § 17.

¹⁹ *EC-COI-99-7*.

²⁰ *Edgartown v. State Ethics Commission*, 391 Mass. 83, 89 (1984) (emphasis added in *Edgartown*) (quoting *Commonwealth v. Canon* 373 Mass. 494, 504 (1977), cert. denied, 435 U. S. 933 (1978) (Liacos, J., dissenting on other grounds)).

²¹ See e.g., *EC-COI-87-31*; *PEL 98-1*; *PEL-99-2*.

²² *EC-COI-87-3*; *EC-COI-88-9*.

²³ *EC-COI-88-9*. See also *PEL 99-2*; *PEL 98-2*.

²⁴ Emphasis added. St. 1998, c. 100.

²⁵ Although one employed by the permit-granting agency may be in the *best* position to exert influence, the language must also mean that the Legislature was concerned about other municipal employees who are part of the agency that “regulates the activities of the permit-granting agency.” An individual who is employed by an agency that regulates the activities of the permit-granting agency, while perhaps not as influential as one employed by the permit-granting agency, is also in a position to exert undue influence. Similarly, one who *provides services* to the permit-granting agency may exert influence. In contrast, one who only provides services to an agency that, in turn, regulates the activities of the permit-granting agency may not be as influential. Again, keeping in mind the purposes of § 17, we have commented, “This serves to prevent the conflict of interest which would arise, if, for example, an employee’s permit application were to be reviewed by a co-worker, subordinate *or superior* to his own agency.” *EC-COI-99-3* (emphasis added).

²⁶ “Municipal agency, any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder.” G. L. c. 268A, § 1(f).

²⁷ For purposes of this exemption, it is not relevant whether the City Council may also regulate the activities of the zoning board of appeals, planning board or conservation commission because those municipal agencies do not grant “building, electrical, wiring, plumbing, gas fitting or septic system permits.” In general, the Commission is obligated to narrowly construe exemptions to the conflict law’s prohibitions. *EC-COI-01-1*. When the express language does not include such permits or approvals such as a variance, special permit or order of conditions, the Commission has not interpreted such clear language to include those other types of municipal permits. “[W]hen the legislature expresses things through a list, the court assumes that what is not listed is excluded.” Singer, *Sutherland Statutory Construction*, § 47: 23 (6th Ed.). Section 17, therefore, prohibits a City Councilor from being privately compensated and from acting as agent or attorney for a private party in relation to, for example, permits issued by the zoning board of appeals, planning board or conservation commission.

²⁸ *Int’l Organization of Masters, etc. v. Woods Hole, Martha’s Vineyard & Nantucket Steamship Authority*, 392 Mass. 811, 813 (1984) (“The intent of the legislature is to be determined primarily from the words of the statute, given their natural import in common and approved usage, and with reference to the conditions existing at the time of enactment. This intent is discerned from the ordinary meaning of the words in a statute considered in the context of the objectives which the law seeks to fulfill.”)

²⁹ *EC-COI-99-2* (from *Black’s Law Dictionary*, 5th ed. West, 1979). See also *Webster’s Third New International Dictionary* (1993) (“to govern or direct according to rule . . . to bring under the control of law or constituted authority . . . to reduce to order, method or uniformity . . . to fix the time, amount, degree, or rate of (as by adjusting, rectifying).”).

³⁰ *Foster v. Mayor of Beverly*, 315 Mass. 567, 569 (1944) (discusses G. L. (Ter. Ed.) c. 40, § 25, which provided that to promote health, safety, convenience, morals or welfare of inhabitants, a city “may by ordinance . . . regulate and restrict the . . . use of . . . land for trade, industry, residence or other purposes.”).

³¹ *Shea v. Boston Edison Company*, 431 Mass. 251, 253-254 (2000) (the Department of Telecommunications and Energy’s authority includes the right to approve of, and regulate, rates charged by investor-owned utilities to customers while the Department’s regulatory authority over municipal lighting plants (MLPs) “has been minimal.” “Most MLP’s are governed by a locally elected board Daily MLP operations are overseen by an appointed manager. . . . Without department review or approval, MLP’s have had the authority to acquire property, . . . enter into contracts to purchase electricity, . . . or to purchase equipment, supplies, or materials, . . . to incur debt, . . . and to raise capital.” *Id.* at 254).

³² *Ryan v. Fallon Community Health Plan*, 921 F. Supp. 34, 38, 37 (D. Mass. 1996) (“The Massachusetts law of breach of contract is not a law that ‘regulates insurance’ under either a common sense view or the McCarran-Ferguson Act factors,” which include whether the state law has the effect of transferring or spreading a policyholder’s risk, the state law is an integral part of the policy relationship between the insurer and insured, and whether the state law is limited to entities within the insurance industry.).

³³ G. L. c. 131, § 39A (describes how municipalities within Berkshire county may adopt rules and regulations to protect watershed resources; defines the term “regulated activities” as “removal, filling, excavation or other alteration of land within mountain regions . . .”; defines the term “regulations” as “reasonable rules or regulations to carry out provisions of this section for the protection of watershed resources . . .”)

³⁴ G. L. c. 130, § 80 (“No person shall take or sell fish from a fishery regulated by the director [of the Division of Marine Fisheries] without a regulated marine fishery permit . . .”).

³⁵ *EC-COI-99-3* describes firefighters who were effectively employed by the permit-granting agency.

³⁶ *EC-COI-99-2*.

³⁷ *EC-COI-99-2*.

³⁸ In addition, we are obligated to narrowly construe exemptions to the conflict law’s prohibitions. *EC-COI-01-1*. The language of this exemption shows that the intent is to allow municipal officials to work privately on these specific permits, as long as their municipal positions are sufficiently isolated from having an ability to affect the permit-granting agencies. The public policy behind the conflict law supports not allowing a City Councilor to place himself, through his private endeavors, in a position to favor his private client’s interests over the interests of the City’s Inspectional Services Department in enforcing the Building Code or the City’s Zoning Ordinance. Similarly, the Commissioner would be understandably concerned about how the Department handled such an applicant’s permit application, or interpretation of the Building Code or Zoning Ordinance, knowing that the applicant was represented by a City official who had power over the Commissioner’s job, his budget, or administrative structure.

³⁹ These are some examples, and are not meant to be a complete list of particular matters that would be prohibited from the City Councilor’s private work within the City. He is also obligated to inquire from prospective clients whether the work will involve any matters that might put him in violation of the conflict of interest law. See e.g., *EC-COI-98-1* (in discussing § 4, the state counterpart to § 17, the Commission advised state employee that at the time a prospective private client approaches him, he has a duty to inquire whether his proposed work is reasonably likely to involve particular matters prohibited under § 4).